

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN  
[SQUARE BRACKETS]

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**IN THE FAMILY COURT  
AT AUCKLAND**

**I TE KŌTI WHĀNAU  
KI TĀMAKI MAKĀURAU**

**FAM-2016-004-001131  
[2021] NZFC 12153**

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| IN THE MATTER OF | THE CARE OF CHILDREN ACT 2004                         |
| BETWEEN          | [SHAKTI PADHYA] (AKA) [SHAKTI<br>VISWAN]<br>Applicant |
| AND              | [ARPIT PADHYA]<br>Respondent                          |

Hearing: 1 December 2021

Appearances: C Gelston for the Applicant  
T Brown for the Respondent  
N Rasheed as Lawyer for the Child

Judgment: 1 December 2021

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**ORAL JUDGMENT OF JUDGE K MUIR**

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[1] One of the sad features of the brutally indiscriminate COVID 19 pandemic of the last 20 months or so, is that families have been separated by the tyrannies of distance. Significant family events have gone unobserved because people have been unable to travel, both within New Zealand and internationally. People have had to forgo attending the funerals of close families, have been unable to provide comfort to

sick parents and have generally been isolated. Not because of the whims of the government or the whims of other family members associated with them, but because of the indiscriminate nature of the virus that is COVID 19.

[2] [Rishu Padhya] is six years old, his maternal and paternal grandparents all live in India. Sadly, his paternal grandfather is terminally ill and his mother, Ms [Viswan], has applied for and obtained a scarce MIQ spot, which will enable her to travel to India with [Rishu] between 12 January 2022 and 24 February 2022, to see her father, hopefully before he dies.

[3] [Rishu]’s father, Mr [Padhya] has not consented to the trip. There was previously an order preventing [Rishu]’s removal from New Zealand in place but the consent parenting order made on 23 June 2020, discharged that order and indeed it has specific provisions for the parties to travel to India with [Rishu] from time to time. Mr [Padhya] is concerned about the risks that COVID 19 represent to [Rishu]. He is concerned about pollution in Delhi and current significant outbreak of dengue fever. He is also concerned about [Rishu] missing a month of school if he travels on those dates. He says his concern is: *“Purely based on [Rishu]’s safety and best interests.”* He acknowledges [Rishu]’s imperative need to maintain his relationship with whanau from both sides: *“But when it is safe to do so.”*

[4] So the issues that I have to decide, is it in [Rishu]’s welfare and best interest to travel to India with his mother? Is it safe for him to travel, particularly in light of the current international COVID 19 emergency?

[5] I have considered whether it is essential that I make a formal decision granting leave for this application to be brought under s 139(a). On a literal reading of the section, it clearly is, because a new proceeding may not be commenced under s 46R without leave of the Court, if it is substantially similar to one previously filed in Court. I note that there was a s 46R application made before Judge Druce in 2017, which is over two years ago now. I also note that what is essentially being sought here is consent to travel for a unique trip for unique reasons. It makes little sense that leave is required, but in the event that leave is required, I grant leave for the application to proceed, because it is obviously important, given that [Rishu]’s parents are unable to

agree on what should happen here, the Family Court have the opportunity to exercise its judgment, as it is required to do so under s 46R, where there is a decision of this kind to be made.

[6] This is, in my view, a guardianship decision, s 16 sets out the specific rights, powers and duties of guardians. International travel is not included as one of those duties, but significant and important decisions affecting the children are commonly considered guardianship decisions. Among cases where it has been confirmed that s 46R is an appropriate vehicle to solve issues of this kind are *NCR v BGL*.<sup>1</sup> I note from that case that the Court is likely to be more receptive to an application to take a child to a country, which is a party to the Hague Convention on child abduction and that the Court will be reluctant to approve taking a child to a country that is subject to a travel warning issued by the Ministry of Foreign Affairs, for any reason.

[7] As in any decision under the Care of Children Act 2004, the focus has to be on [Rishu], in his particular circumstances. His best interests and welfare are my primary and only focus. I need to be guided by the principles in s 5 of the Care of Children Act, which are society's guiding principles on what we consider to be in a child's welfare and best interests.

[8] The relevant parts of s 5 in this case are of course s 5(a) which requires [Rishu]'s safety to be protected and tells me that I must ensure that his safety is protected, 5(b)(c) and (d), which essentially provide that his parents should continue to be primarily responsible for his care, development and upbringing, they should consult about it and that there should be continuity in his care, development and upbringing. And 5(e) and (f) also loom here, because Ms Gelston, acting for Ms [Viswan] urges on me the fact that the trip to India to see his dying grandfather is important for his relationship with his wider family group and important for cultural reasons, which are the factors set out in ss 5(e) and (f).

[9] [Rishu]'s parents are not strangers to the Court, there is a significant body of proceeding litigation. The file includes a s 133 report, which is fairly comprehensible, be it now a couple of years old. As a result of that litigation, they were finally able to

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<sup>1</sup> *NCR v BGL* Family Court Hastings FAM-2002-20-517 4 November 2005.

negotiate a final parenting order, in about June 2020. Under that final parenting order [Rishu] is now in shared care, he spends six consecutive days/nights a fortnight with his father and the balance of the time with his mother. As I have said, the order includes a provision that deals with trips to India, specifically if it is possible for both parents to travel, then [Rishu] is to be able to spend at least two weeks with the paternal and two weeks with the maternal family while in India. The family is able to travel from India to visit [Rishu] to be allowed time to see them.

[10] Ms [Viswan] has filed with her application an affidavit which includes a medical certificate, establishing that her father is suffering from the late stages of renal failure. He has been on dialysis for many years now, he recently unfortunately had a fall, shattering his femur and damaging his knee. However, Mr [Padhya] says that this is not the first time that he has been told or the Court has been told by Ms [Viswan] that travel is essential because her father is terminally ill. He says that there was a trip in 2014, during which she learned she was pregnant with [Rishu], where she travelled on the basis that her father was terminally ill. In 2015 when [Rishu] was an infant, she spent six months in India. Again, she believed her father was terminally ill at that time. In 2017 and 2019, her father's illness was also a factor.

[11] In saying that, I did not read his affidavit as necessarily implying that [Rishu]'s grandfather's illness was not genuine. I have no hesitation in accepting that he is genuinely ill and possibly, if not probably, terminally ill. I have no information whatsoever as to his prognosis or how much longer he will have, in order to meet with his family and say his goodbyes. I understand entirely Ms [Viswan]'s wish to travel with [Rishu] to see her father. She says: "*It is important to me that [Rishu] and I have a chance to spend time with my father.*" Her filial duties are important, and it is clear to me that [Rishu] will have built an established relationship with his grandfather over the course of the visits that he has been able to make in his relatively short life so far.

[12] Why is Mr [Padhya] not consenting to [Rishu] travelling? Well, he says he is prepared to care for [Rishu] while Ms [Viswan] travels. He is concerned about [Rishu] being away from him for at least the eight weeks that will be involved here. The travel itself is for a period of some six weeks, but there is every prospect that there might need to be a two-week time in MIQ or in similar isolation once [Rishu] returns. He is

worried about the fact that his son is unvaccinated, he says that he is happy for [Rishu] to travel to Delhi in about April 2022, because by then he anticipates that [Rishu] will be fully vaccinated.

[13] He is also concerned about dengue fever, he has attached an article to his affidavit, which establishes that there were almost 1,200 in the first six days of November in Delhi. Although I note that Delhi has a population of approximately 19 million people. He is also genuinely concerned about the bad pollution in Delhi, and that at least is a seasonal issue, it is worse in the autumn and winter and there is a prospect that the air might be clearer in April. He is also concerned about the time that [Rishu] will be in isolation, and in transit and the potentially long stay in MIQ on [Rishu]'s return. And he is understandably concerned that [Rishu] will miss four weeks of school, given the dates of travel.

[14] Ms [Viswan] points out that the current order was negotiated and finalised in June 2020. She says that must mean that the parties contemplated that travel might occur while COVID 19 was in the world. She notes that there is the general agreement that each parent can spend two weeks with [Rishu] in India, provided appropriate notice is given. She emphasises the fact that she has been to India at least twice with [Rishu], she emphasises that her brother and his family have travelled from Canada and will be there also. This is an opportunity for [Rishu] to spend time with extended family, particularly with a young cousin, who is four years old. Obviously that time is important to [Rishu], if it is available, contact with extended family where they are internationally situated will be a rare opportunity which should not be missed unless there is good reason.

[15] I am also told from the bar that the risks to children from infection with COVID 19, even with Delta are comparatively minor. I do not know that, I do not have expert evidence that confirms that. I understand that it is perceived that there is a significantly lower chance that they might transmit the infection and generally they do not become as ill as adults, particularly older adults can become. However, I note that the Delta variant has caused significant illness and death in relatively young people and it is not unheard of for children to become very sick and even terminally ill with various strains of COVID 19.

[16] However, Ms [Viswan] also submits that the risk of transmission in India is less than the risk of transmission in New Zealand, because we have Delta in the community. Again, I do not know that, I do not have any expert evidence to confirm that. I accept that the wave of COVID 19 infection that was sweeping through India causing so much difficulty to the country's hospitals and infrastructure has gone. I accept that India is no longer on the very high-risk list of countries from which travellers to New Zealand are essentially banned because of COVID 19. They seem to be doing relatively well. But I do not know that COVID 19 is not present or endemic in the community in Delhi.

[17] I do just need to discount Mr [Padhya]'s concerns about dengue fever and pollution, both of those risks are endemic to Delhi and yet the parents had agreed that [Rishu] could travel to India with either one or both of them fairly regularly and that is contained in the order. Those factors alone are not featuring in my considerations today.

[18] Finally, Ms [Viswan] advised in the course of submissions that she was willing to shorten her trip so that she would be away for four weeks instead of six weeks. Which would mean that [Rishu] might only be away from his dad for perhaps six weeks, including time in MIQ on return, assuming all goes about as might averagely be expected. So for her, the importance of [Rishu] having an opportunity to say goodbye to his grandfather with her, ranks above the risks that might exist in travel in this COVID 19 affected world.

[19] Ms Rasheed has been lawyer for [Rishu] for quite some time now. She has not had an opportunity to see [Rishu] nor speak to him, that is because this hearing is proceeding on a Pickwick basis, following a without notice application that has been filed in the last couple of days and she has been instructed for less than 24 hours. However, I agree with her that [Rishu] is too young to hold a meaningful view about the issue of whether or not this trip is in his welfare and best interests.

[20] Her main concern was whether or not this trip is actually child focused, what are the benefits for [Rishu] in travelling against the risks of travel? He will be up to eight weeks away from his father and he essentially has shared care at the moment.

His grandfather is very ill, [Rishu] has been fortunate to see his grandfather in the past in recent years, when he has been less ill. I wonder how much benefit [Rishu] is actually going to gain from seeing his grandfather when he is so ill.

[21] There also must be significant risks in a trip to Delhi with its population of 19 million and its significant population density. India is off the very high-risk list of countries but it only came off that list in late November and that could change again. There are so many unknowns here, there is a new variant of Covid present in the world at the moment, Omicron. That is not yet present in New Zealand but there has to be a risk that it might be present in India or might be transmitted in the course of travel or transition. Another unknown is how willing New Zealand will be to allow people, even citizens to return in three months' time if there is new variant at large. The problem with COVID 19 is that the situation has been so fast moving and governments have literally had to make decisions on the hoof.

[22] This is a difficult question for me to decide, but I note in particular that in a brief discussion that I had with her, Ms [Viswan] acknowledged that she had not been contemplating travel to India in 2021 or 2022, essentially because of the international situation with COVID 19. She had made no long-term plans to travel with [Rishu], even though recent history she has travelled with him at intervals of between one and two years. That indicates to me that she did not consider that the risks associated with COVID 19 were worth braving, in order for [Rishu] to travel to see her family in India.

[23] I am also concerned that [Rishu] will be a month out of school if I allow this travel. His attendance record is somewhat patchy anyway and it is something that his parents could focus on I think, particularly his father. I am concerned about the significant time he would be away from his father, given that there is shared care. An issue that Ms Rasheed highlighted is that [Rishu] is a very active young boy, she is very concerned about the time he would have to spend cooped up, both in transit, which could take a few days and a week's isolation in a small indoor space in India, followed by up to two weeks' isolation on return to New Zealand. There are multiple unknown risks associated with that travel. I also do not know whether it will be possible to vaccinate [Rishu], even if travel is delayed until the end of January, as Ms

[Viswan] proposed. It is much more likely, in fact probable, that [Rishu] will be able to travel fully vaccinated if his travel is delayed until April as his father has proposed.

[24] I accept that would be a sad outcome for Ms [Viswan], who no doubt would be comforted by having [Rishu] in her presence, when she travels to India to see her family and her seriously ill father. I am confident though that [Rishu] will cope, should she decide to go. Good contact can be maintained between him and her using Skype amongst other things. He will be well cared for by his father during her absence. So at least the tyrannies of distance and the tyrannies of COVID 19 will not prevent her from having an opportunity to say goodbye to her father, should she choose to go.

[25] At the end of the day in the balancing exercise that I am required to carry out, I find that [Rishu]'s welfare and best interests indicate that the risks and unknown factors that are associated with allowing him to travel at this particular time, significantly outweigh any benefit that he might obtain from the travel. I therefore decline Ms [Viswan]'s application for a direction under s 46R, allowing him to travel now, my decision instead is that he should not travel, as she has planned.

[26] I do record however, that both of [Rishu]'s parents have indicated that it is likely that it would be appropriate for him to travel in April, once he is double vaccinated. That is not a decision that should be revisited or resiled from, unless there is some particular seriously concerning change in the status of the COVID 19 emergency.

[27] Finally, on the issue of costs, Mr [Padhya] is to file a memorandum outlining the costs he seeks and the ground for those costs by 4 pm on 6 December, it should be no more than five pages, plus any appropriate attachments. Any submission in reply should be filed by 4 pm on 10 December, again limited to five pages plus any appropriate attachments.